Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

Jose V. Sanchez,

Petitioner,

vs.

Minson Corporation, et. al.,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

Jose V. Sanchez
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Petitioner in *pro se*

QUESTIONS PRESENTED

1. Whether Petitioner properly served the summons and complaint?

2. Whether the United States district court properly dismissed the complaint?

PARTIES TO THE PROCEEDING

Petitioner Jose V. Sanchez was the Plaintiff in the United States district court and the Appellant in the United States court of appeals.

Respondent in this court is Minson Corporation et. al.

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NO._____

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ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The United States court of appeals dismissed my case on April 26, 2004. No petition for rehearing was timely filed in my case.

The pertinent part of the Constitution of the United States provides "[w]e the People of the United States, in Order to establish justice, do ordain and establish this Constitution for the United States." The Federalist Papers, Federalist Number, 51 Section 1 of Article III provides in presently pertinent part that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Warth v. Seldin, 422 U.S. 490, 498-99 (1975) And Section 2 of the Article provides among other things "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States." Osborn v. United States Bank, 22 U.S. 738, 819 (1824); Old Colony Tr. Co., v. Commrint Rev., 279 U.S. 716, 724 (1929) Section 1254, Title 28, United States Code provides "[c]ases in the courts of appeals may be reviewed by the Supreme Court by the following methods." And Subsection (1) of the Section provides "[b]y writ of certiorari granted upon the petition of any party to any case, after rendition of judgment or decree." Superior Court of

State of California v. United States District Court, 256 F.2d 844, 847 (1958)

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent parts of the Bill of Rights is "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (14th Amendment to the Bill of Rights)

The essential elements of due process of law are notice, an opportunity to be heard, and the right to defend in an orderly proceeding." *Fiehe v. R.E. Householder Co.,* 125 So. 2, 7 (Fla. 1929).

"To dispense with notice before taking property is likened to obtaining judgement without the defendant having ever been summoned." *Mayor of Baltimore vs. Scharf,* 54 Md. 499, 519 (1880).

"An orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case. *Kazubowski v. Kazubowski,* 45 Ill.2d 405, 259, N.E.2d 282, 290." Black's Law Dictionary, 6th Edition, page 500.

"Due Process of law implies and comprehends the administration of laws equally applicable to all under established rules which do not violate fundamental principles of private rights, and in a competent tribunal possessing jurisdiction of the cause and proceeding upon justice. It is founded upon the basic principle that every man shall have his day in court, and the benefit of the general law which proceeds only upon notice and which hears and considers before judgement is rendered." *State v. Green,* 232 S.W.2d 897, 903 (Mo. 1950).

"Phrase means that no person shall be deprived of life, liberty, property or of any right granted him by statute, unless matter involved first shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings, and it forbids condemnation without a hearing, *Pettit v. Penn.,* La.App., 180 So.2d 66, 69." Black's Law Dictionary, 6th Edition, page 500.

"Due Process of law implies the right of the person affected thereby to be present before the tribunal which

pronounces judgement upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law." Black's Law Dictionary, 6th Edition, page 500.

"Aside from all else, 'due process' means fundamental fairness and substantial justice. *Vaughn v. State,* 3 Tenn.Crim.App. 54, 456 S.W.2d 879, 883." Black's Law Dictionary, 6th Edition, page 500.

'The law of the land,' as used in the constitution, has long had an interpretation, which is well understood and practically adhered to. It does not mean an Act of the Legislature; if such was the true interpretation, this branch of the government could at any time take away life, liberty, property and privilege, without a trial by jury." *Saco v. Wentworth,* 37 Maine 165, 171 (1852).

The provision [due process clause] is designed to exclude oppression and arbitrary power from every branch of government." *Dupuy v. Tedora*, 15 So.2d 886, 890, 204 La. 560 (1943).

STATEMENT OF THE CASE

From August 1996 through July 2001, Plaintiff worked for Defendant in the Welding Department.

Throughout that time, Plaintiff was a victim of severe age and racial discrimination, nepotism, unequal distribution of hours and overtime, unjust pay and eventually wrongful termination.

Plaintiff is Columbian and was 58 years old at the time he was hired by Defendant. Plaintiff was 62 when he was laid off.

The majority of the employees in the Welding Department where Plaintiff worked and in the entire company, were Mexican. The Supervisor, Jacobo Lujan, was one of those. Many family members of Mr. Lujan worked for the company, had better hours, better wages, and more overtime than Plaintiff, in spite of the fact that Plaintiff had attended school and earned certificates in welding and machinery and many of the other employees had less experience and no schooling or certificates. Mr. Lujan and his family constantly and consistently harassed, humiliated, insulted, Plaintiff due to his nationality and age in violation of *Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967*. They degraded him and defamed him by calling him names such as "stupid old man", "incompetent old man", etc. Mr. Lujan as a Supervisor and authority figure in the company both participated in and authorized, sanctioned, condoned, and otherwise permitted such behavior toward Plaintiff, with no

regard or thought for Plaintiff's civil rights, employment rights, etc. Defendant was aware of, and therefore, in effect, also authorized, sanctioned, condoned and otherwise permitted this behavior to continue for five years, at which time, Plaintiff was laid off unjustly. No explanation was ever provided Plaintiff in regards to his lower wages, the harassment he was subjected to or the discrimination. No discipline was given to either Mr. Lujan or his family members, nor were his family members subject to the same lay off as Plaintiff.

In approximately the beginning of 2002, Plaintiff filed a formal complaint with the EEOC for labor violations, discrimination, racism, and other similar and related complaints. The complaint with the EEOC eventually brought an offer from the Defendant for 200 to 300 days of pay.

On August 5, 2002, Plaintiff filed a complaint with the United States District Court, Western Division for Discrimination, pursuant to Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. Throughout this action, Plaintiff remained in Pro Per. Defendant attempted to discredit Plaintiff and to cover up the multiple discrimination and labor violations which Plaintiff suffered while working for Defendant. Defendant, in their attempt to cover up the major issues of the case, alleged that

they were never properly served. However, Plaintiff in an attempt to represent himself in this matter, did manage to complete service on the last day allowed him by the court.

While it is true that Plaintiff was delayed in being able to properly serve the Defendant, the United States District Court ignored Plaintiff's documentation and arguments. The Defendant, in it's own declarations, state that Plaintiff had in fact served them, "To properly serve defendants, plaintiff may have copies of the summons and complaint personally delivered to defendants (Cal Code of Civ Proc § 415.10), or alternatively, may have copies of the summons and complaint left at defendants' place of business with the person who is apparently in charge thereof, as is required by California Code of Civil Procedure § 415.20(a)". On March 7, 2003, Plaintiff caused to have served on Defendant the Summons and Complaint, and said service was completed by personally delivering the documents to Defendant's office and serving Melissa Davila (Wallach Decl. ¶ 3, ER p. 26; 3/7/03 Proof of Service, ER p. 21). Additionally, numerous copies of the Summons and Complaint were certified mailed to Defendants, none of which were returned to Plaintiff.

REASONS FOR GRANTING PETITION

I. The United States court of appeals decision is arbitrary, capricious, conscious-shocking, oppressive and inconsistent with the constitutional provision of "due process of law" of the Fifth Amendment of the Constitution of the United States and thus warrants an exercise of this court's supervisory power forthwith and without delay, in the furtherance of substantial justice.*

The United States District court and the United States Court of Appeals discriminated against Plaintiff and totally and completely ignored both his statements and arguments in defense of the correct service of process, but also ignored the contradictions in Defendant's own paperwork, wherein Defendant admitted that they had been served, and clearly they have been served and have also responded in a manner as to cover up the main issues of the case

which are age and race discrimination, labor violations, and unjust and wrongful termination.

CONCLUSION

From the beginning, with the EEOC complaint, Defendant offered to compensate Plaintiff with 200 to 300 days pay, however, this was an attempt to prevent Plaintiff from taking the complaints to a higher level and obtaining true justice. Subsequently, in the District court, Defendant has attempted to discredit Plaintiff and to avoid having the full issues of Plaintiff's case deliberated in a Court of law by contradicting themselves in their own declarations. Plaintiff, although through a delay, managed to properly serve Defendant on the last possible day, a fact which even Defendant admitted. However, both the District Court and the Court of Appeals ignored both Plaintiff's proofs and arguments, but also the contradiction blatantly apparent in Defendant's own declaration.

Respectfully submitted,

Dated:

_____

Jose V. Sanchez
Petitioner in *pro se*

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MAY 28, 2003
CENTRAL DISTRICT OF CALIFORNIA
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CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CA –

WESTERN DIVISION

JOSE VICENTE SANCHEZ)
)
Plaintiff)
)
v.)
)
MINSON CORPORATION)
Et al.,)
)
Defendants)
)
CONSTITUTES)
_____)

Case No.
CV 02-6078-R
(JWJ)

MEMORANDUM
AND
ORDER
DISMISSING
COMPLAINT
WITHOUT
PREJUDICE

THIS

NOTICE OF ENTRY
AS REQUIRED BY
FRCP, RULE 77(d)

I. BACKGROUND

On August 5, 2002, plaintiff Jose Vicente Sanchez filed a "Complaint for Discrimination" with this Court. On August 15, 2002, this Court issued a Minute Order advising plaintiff that, "under Federal Rule of Civil Procedure 4(m), service of the summons and complaint must be accomplished on each named defendant within 120 days after the filing of the complaint." (8/15/02 Minute Order.) Plaintiff was also advised that the time for serving the complaint would expire December 5, 2002, and that failure to effect service by that date could result in the dismissal of the action without prejudice. (Id.)

Since no proof of service was on file by January 6, 2003, this court issued an Order to Show Cause why service had not been accomplished. (1/6/03 OSC.) On January 14, 2003, plaintiff filed a Response to Order to Show Cause, attaching proofs of services on Minson Corporation and Knee & Ross, LLP dated August 6, 2002. Plaintiff also attached copies of certified mail receipts. On January 14, 2003, this Court vacated its Order to Show

Cause dated January 6, 2003 based on those proofs of service. However, upon further review of the proofs of service submitted by plaintiff, this Court determined that plaintiff did not properly serve defendants.

Plaintiff's proofs of service and accompanying certified mail receipts show that service on defendants was accomplished by mailing the complaint via certified mail. The proofs of service did not indicate that copies of the complaint and summons had been left at the defendant Minson Corporation's business offices, during usual office hours, with a person who is apparently in charge thereof, as required by California Code of Civil Procedure §415.20(a). See Fed.R.Civ.P. 4(h)(1).

On February 25, 2003, this Court issued an Order to Show Cause, allowing plaintiff ten (10) more days to provide the Court with proof that proper service had been accomplished. (2/25/04 OSC, p.2) Plaintiff was advised that to properly serve defendants, he may have copies of the summons and complaint personally delivered to defendants (Cal C.C.P. § 415.10), or, alternatively, may

have copies of the summons and complaint left at defendants' place of business with the person in charge thereof, followed by the mailing of copies of the summons and complaint by first-class mail (Cal.C.C.P.§ 415.2). (2/25/03 OSC, p.2.) The Court cautioned plaintiff that failure to provide the Court with proof of proper service within ten (10) days of the date of the Order may result in his complaint being dismissed without prejudice pursuant to Federal Rule of Civil Procedure 4(m). (Id.)

On May 8, 2003, the Court held a hearing on this matter at which plaintiff and counsel for defendants were present. Plaintiff asserted that he had effected proper service by leaving a copy of the Complaint with the receptionist at the offices of defendants' counsel. Defendants argued that such service is not sufficient, as defendants' counsel is not authorized to accept service on their behalf.

The hearing Court finds that plaintiff has not properly served the defendants in this action. Thus, the Complaint

must be dismissed without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

II. DISCUSSION

A. Federal Rule of Civil Procedure 4(h).

Federal Rule of Civil Procedure 4(h)(a) provides for service upon a domestic or foreign corporation "in the manner prescribed for individuals by subsection (e)(1). Subsection (e)(1) states that service may be effected "pursuant to the law of the state in which the district court is located, or in which service is effected." Pursuant to California law, a plaintiff may serve a defendant by having copies of the summons and complaint personally delivered to defendants (Cal.C.C.P. § 415.10), or alternatively, by having copies of the summons and complaint left at defendants' place of business with the person in charge thereof, followed by the mailing of copies of the summons and complaint by first-class mail (Cal.C.C.P. §415.20).

Plaintiff did not serve defendants in either of these two manners. Rather, he attempted to effect service by leaving a copy of the Complaint with defense counsel's

receptionist. Such an attempt at service does not comply with the Federal Rules of Civil Procedure or the California Code of Civil Procedure. Therefore, plaintiff has failed to properly serve defendants.

B. Dismissal Pursuant to Federal Rule of Civil Procedure 4(m).

Federal Rule of Civil Procedure 4(m) provides that a district court upon its own initiative shall dismiss an action where a summons and complaint has not been served within 120 days after the filing of the complaint. Here, plaintiff was given notice in the Court's 8/15/02 Minute Order and 2/25/03 OSC that failure to file proofs of proper service of a Summons and Complaint on defendants would result in the dismissal without prejudice of this action. Plaintiff is now well past the 120-day deadline, which expired on December 5, 2002. Accordingly, dismissal of this action without prejudice is appropriate. See Johnson v. Meltzer, 134 F.3d 1393, 1396 (9th Cir. 1998) (District Court may enter order dismissing action without prejudice

for failure to serve complaint within 120 days pursuant to Federal Rule of Civil Procedure 4(m).); Hamilton v. Endell, 981 F.2d 1062, 1056-66 (9th Cir. 1992).

C. Good Cause Exception.

Federal Rule of Civil Procedure 4(m) also provides that "if the plaintiff shows good cause for the failure (to timely serve a summons and complaint), the court shall extend the time for service for an appropriate period." The Court has already afforded plaintiff an additional ten (10) days to provide the Court with proof that proper service has been accomplished. (2/25/03 OSC, p.2.) Given this previous extension of time, and plaintiff's apparent insistence at the 5/8/03 hearing that the actions he has taken to serve defendants are sufficient, the Court does not believe that another extension of the 120 day period would result in plaintiff's compliance with Federal Rule of Civil Procedure 4(h). Therefore, the Court does not find good cause to again extend the time for service.

////

ORDER

IT IS HEREBY ORDERED AS FOLLOWS:

The instant Complaint is dismissed without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

DATED: May 27, 2003

//signature//

MANUEL L. REAL
United States District Judge

Presented by:

DATED: May 23, 2003

//signature//
JEFFREY W. JOHNSON
United States Magistrate Judge

FILED
APR 26, 2004
CATHY A. CATTERSON,
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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE VICENTE SANCHEZ,

Appellee,

vs.

MINSON CORPORATION,

Appellant

Case No.:
No. 03-56054

D.C. NO.
CV-02-06078
-MLR

MEMORANDUM*

Appeal from the United States District Court
For the Central District of California
Manuel L. Real, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Submitted April 12, 2004**

Before: O'SCANNLAIN, RYMER, and BEA, Circuit Judges.

Jose Vicente Sanchez appeals pro se from the district court's order dismissing his employment discrimination action for failure to prosecute. We review for abuse of discretion a dismissal for failure to timely serve the summons and complaint, Walker v. Sumner, 14F.3d 1415, 1422 (9th Cir. 1994), and we affirm.

The district court properly dismissed the action without prejudice to refiling, because Sanchez failed properly to serve a summons and complaint on the defendant corporation within 120 days, *see* Fed. R. Civ. P. 4(k); Cal. Civ. Proc. §§ 415.10 & 415.20, or show good cause for this failure, *see* Fed. R. Civ. P. 4(m); *Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th Cir. 1992) ("inadvertent error or ignorance of governing rules alone will not excuse a litigant's failure to effect timely service.").

To the extent that we construe Sanchez's opening brief to move for appointment of counsel, we deny this motion, because a review of the record indicates that this appeal lacks sufficient merit to warrant the appointment of counsel. *See Bradshaw v.*

Zoological Soc'y of San Diego, 662 F.2d 1301, 1318 (9th Cir. 1981).

AFFIRMED.

No. 04-401

IN THE

Supreme Court of the United States

JOSE VICENTE SANCHEZ,

Petitioner,

v.

MINSON CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MINSON CORPORATION

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QUESTION PRESENTED

Whether the district court abused its discretion by dismissing Petitioner's complaint, pursuant to Federal Rule of Civil Procedure 4(m), for failure to complete service of process?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Minson Corporation does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Petitioner Jose Vicente Sanchez ("Petitioner" or "Sanchez") sued his employer, Respondent Minson Corporation ("Respondent" or "Minson"), for age and national origin discrimination after he was laid off from his job as a welder in July, 2001. The lawsuit, commenced in August, 2002, was never properly served on Minson. In February, 2003, the district court ordered Sanchez to show cause why his complaint should not be dismissed and granted him 10 more days to complete service. When he failed to do so, the court dismissed the complaint without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

Sanchez timely appealed the dismissal to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the dismissal.

This Court should deny the petition because there is no split of authority among the circuits. Rule 4(m) provides that when the summons and complaint have not been served within 120 days after filing, the court shall dismiss the action or direct that service be effected within a specified time. It appears that, in every circuit to consider the issue, decisions to dismiss for failure to complete service of process are reviewed for abuse of discretion.

The district court followed the procedures prescribed by Rule 4(m). The court provided Sanchez with additional time to complete service of process as well as explicit directions about how to do so. But Sanchez chose to stand by his prior attempts at service and disregarded the court's instructions.

Because Sanchez failed to follow the district court's instructions and insisted that his actions to effect service of

process were sufficient, the district court determined that good cause did not exist to further extend the deadline for service. In so ruling, the court did not abuse its discretion. The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Minson is a furniture manufacturer located in Montebello, California. Mr. Sanchez, a native of Columbia, worked for Minson as a welder from 1996 until he was laid off in July, 2001 as part of a mass layoff necessitated by a slowdown in business.[1] Mr. Sanchez was 58 years old when he was hired and 62 at the time he was laid off.

Sanchez filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of his age and national origin.[2] After investigation, the EEOC determined there was no evidence that federal law had been violated.

---

1. Because Minson was never required to answer Sanchez's complaint, these facts are taken from the complaint and the petition. Minson's response to the EEOC charge sets forth a slightly different sequence of events. In reality, Mr. Sanchez was initially hired to work for Minson in May, 1996. He was laid off in August, 1996 and recalled to work in August, 1997. Mr. Sanchez continued to work for Minson until he was laid off again in July, 2001, as part of a mass layoff necessitated by a slowdown in business. Over 20 other employees in the welding department where Mr. Sanchez worked were laid off around the same time.

2. Sanchez avers that the EEOC Charge "eventually brought an offer from the Defendant for 200 to 300 days of pay." Pet. at 5 and 7. Even if this were true, which it is not, such a settlement offer would be inadmissible to establish liability, *Mundy v. Household Finance Corp.*, 885 F.2d 542, 546 (9th Cir. 1989), and immaterial as to the sufficiency of service of process now at issue.

On June 20, 2002, the EEOC issued Sanchez notice of his right to commence a lawsuit within 90 days.

Sanchez timely filed a civil action in the U.S. District Court for the Central District of California pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Sanchez's complaint was filed *in pro per* on August 5, 2002. On August 15, 2002, the district court issued a minute order advising Sanchez that he must serve the summons and complaint by December 5, 2002 (within 120 days). Sanchez was also advised that failure to effect service by that date could result in the dismissal of the action without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

Despite this admonition, and several subsequent warnings, Sanchez failed to complete service of process in accordance with federal or California law. Ultimately, on February 25, 2003, the district court issued an order to show cause why the case should not be dismissed for failure to serve the summons and complaint and provided Sanchez with explicit directions as to (1) the steps he needed to take to complete service of process and (2) the consequences of failing to heed its instructions.

The February, 2003, order advised Sanchez exactly how to serve Minson:

> To properly serve defendants, plaintiff may have copies of the summons and complaint personally delivered to defendants (Cal.C.C.P. § 415.10), or, alternatively, may have copies of the summons and complaint left at defendants' place of business with the person in charge thereof, followed by the

> mailing of copies of the summons and complaint by first class mail. (Cal.C.C.P. § 415.20).

Order to Show Cause, p. 2.

When Sanchez failed to complete service of process as instructed, Minson moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(5). On May 8, 2003, the court held a hearing on this matter. Sanchez elected to stand his ground and his case was dismissed without prejudice on May 27, 2003. Sanchez appealed the dismissal, and the Ninth Circuit affirmed.

REASONS FOR DENYING THE PETITION

I. There is No Circuit Split on the Question Presented.

The U.S. Court of Appeals for the Ninth Circuit reviewed the district court's dismissal of Sanchez's complaint pursuant to Fed. R. Civ. P. 4(m) for abuse of discretion. This standard of review appears to have been adopted by every circuit which has considered the issue.[3] *See, e.g., Wei v. State of Hawaii,* 763 F.2d 370, 371 (9th Cir. 1985); *Systems Signs Supplies v. U.S. Dept. of Justice,* 903 F.2d 1011, 1013 (5th Cir. 1990); *Adams v. AlliedSignal General Aviation Avionics,* 74 F.3d 882, 887 (8th Cir. 1996). Citing decisions by the Third, Ninth and Eighth Circuits, the U.S. Court of Appeals for the Second Circuit recently stated in *Thompson v. Maldonado,* 309 F.3d 107, 110 (2nd Cir. 2002): "Although we have not previously determined the standard of review applicable to Rule 4(m) dismissals for failure to serve process, we join our sister

3. The language in Rule 4(m) was previously set forth in Rule 4(j). Some of the court decisions analyzing the issue therefore reference that section.

circuits in reviewing such dismissals for abuse of discretion. [citations omitted]." Because there is no circuit split on the question presented, this Court should not grant review.

II. Dismissal of Sanchez's Complaint was Appropriate Because he Failed to Properly Serve the Summons and Complaint.

Under the Federal Rules of Civil Procedure, a corporate defendant such as Minson can be served by delivering a copy of the summons and complaint to an officer, managing or general agent of the business, or to any other agent authorized by appointment or by law to receive service of process. Fed. R. Civ. P. 4(h)(1). Alternatively, a corporation may be served pursuant to the law of the state in which the federal district court is located or the state in which service is effected, which in this case is California. Fed. R. Civ. P. 4(h)(1) and 4(e)(1).

California law provides that a corporation may be served by personally delivering copies of the summons and complaint to an officer of the corporation, the person designated by the corporation as agent for service of process, or a person authorized by the corporation to accept service of process. Cal. Code Civ. Proc. §§ 415.10, 416.10. California law also permits substitute service on a corporate defendant which is accomplished by (1) leaving a copy of the summons and complaint at the defendant's place of business with the person in charge thereof, and (2) thereafter mailing a copy of the summons and complaint by first class mail. Cal. Code Civ. Proc. § 415.20.

Petitioner contends that he completed service by delivering a copy of the summons and complaint to Minson's

office and leaving them with Melissa Davila. Pet. at 6. According to the proof of service filed by Sanchez, his process server delivered the summons and complaint to Ms. Davila, a receptionist, on March 7, 2003. Ms. Davila was never authorized to accept service on behalf of Minson. Personal service is not accomplished upon a corporation simply by delivering a copy of the summons and complaint to its receptionist. *Baade v. Price,* 175 F.R.D. 403, 405 (D.D.C 1997); *see also*, *Kovalesky v. A.M.C. Assoc. Merchandising Corp.*, 551 F. Supp. 544, 546 (S.D.N.Y. 1982). Moreover, Sanchez failed to effect substitute service under California law, because he did not thereafter mail a copy of the summons and complaint to Minson as required by California Code of Civil Procedure Section 415.20. The Petitioner claims that he mailed "numerous copies" of the summons and complaint to Minson, but does not specify when this took place. Pet. at 6. However, the proof of service (dated March 7, 2003) filed by Sanchez establishes that the summons and complaint were *not* mailed by his process server – or anyone else – after the delivery to Minson's receptionist.

Sanchez had earlier filed a proof of service (dated January 9, 2003) indicating that he mailed the complaint to Minson on August 6, 2002. However, that mailing occurred six months *prior* to the issuance of the summons, which was not issued by the district court clerk until March 3, 2003. Both California law and federal law require that a summons and complaint be served together. Cal. Code Civ. Proc. §§ 415.10, 415.20; Fed. R. Civ. P. 4(c)(1); *Cf. Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351-355 (1999) (discussing different state rules for service of process in context of 30-day period for removal to federal court). Obviously, because the *only* mailing occurred before

the issuance of the summons, the summons and complaint were not mailed together.

Sanchez therefore failed to personally serve Minson and failed to complete substitute service pursuant to California Code of Civil Procedure Section 415.20. Because he failed to complete service of process during the 295 days between the filing of his complaint and its dismissal, the district court did not abuse its discretion in dismissing the action without prejudice.

III. Good Cause Did Not Exist to Further Extend the Time for Service Because (a) Sanchez Failed to Follow the Court's Explicit Directions as to How to Complete Service; and (b) Sanchez Insisted that his Efforts to Serve Process were Sufficient.

Rule 4(m) requires service of process to be completed within 120 days after a complaint is filed. "[I]f the district court concludes there is good cause for plaintiff's failure to serve within 120 days, it *shall* extend the time for service. If plaintiff fails to show good cause, the court still *may* extend the time for service rather than dismiss the case without prejudice." *Adams v. AlliedSignal General Aviation Avionics, supra,* 74 F.3d at 887 (court's refusal to grant discretionary extension was not abuse of discretion). Here, the district court granted Sanchez additional time to complete service of process and instructed him exactly how he could accomplish this, but he failed to comply with the court's directions.

Sanchez filed his complaint on August 6, 2002. He was therefore required, pursuant to Rule 4(m), to serve Minson with the summons and complaint on or before December 5, 2002. The district court explicitly advised him of this

requirement in its minute order dated August 15, 2002. A month after this deadline had passed, the district court observed that service had not been completed and issued an order to show cause why the action should not be dismissed.

In response, Sanchez filed a proof of service which established that he had attempted to serve the complaint by mailing it, but had not completed service of process. On February 25, 2003, the district court issued another order to show cause. In that order, the district court *specifically told Sanchez how to complete service* and ordered him to file proof of effective service within 10 days, *i.e.*, on or before March 7, 2003.[4] Although the district court effectively doubled the 120 day period prescribed by Rule 4(m), Sanchez still failed to properly serve Minson within this new deadline.

As discussed above, Petitioner's process server left the summons and complaint with Minson's receptionist, but did not thereafter mail a copy to Minson. Thus, Sanchez did not effect personal service because the person served was not authorized to accept service for the corporation. And he did not complete substitute service because he failed to mail copies of the summons and complaint to Minson after leaving them with the receptionist.

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4. Indeed, Sanchez partially quotes these instructions in his petition, claiming that he complied by (1) leaving a copy with Minson's receptionist on March 7, 2003 and (2) sending by certified mail "numerous copies of the Summons and Complaint." Pet. at 6. What Petitioner fails to acknowledge is that the only copies ever mailed were posted on August 6, 2002, *prior* to the issuance of the summons and months before, not after, delivery to Minson's receptionist.

The district court found no "good cause to again extend the time for service." Pet. App. A, p. 4. This finding was based upon the previous extension of time and Sanchez's "apparent insistence at the 5/8/03 hearing that the actions he has taken to serve defendants are sufficient." *Id.* "To establish good cause, a litigant must demonstrate 'at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.'" *Systems Signs Supplies, supra,* 903 F.3d at 1013. Here, as in *Systems Signs Supplies,* Petitioner offers his *pro se* status and "his repeated attempts to comply with the rules" as evidence of his good faith. *Id.* While these factors "arguably provide grounds for leniency in considering the technical imperfections of service," the district court here, as in that case, "did not abuse its discretion." *Id.* at 1014.

By insisting to the district court that he *had* complied with its instructions, as he continues to do here, Pet. at 6, Sanchez made the same mistake as the plaintiff in *Systems Signs Suppies*: "Instead of looking at the rules more closely or calling the attorney to find out what the problems were, he chose to dispute the validity of service." *Id. Accord, Adams v. AlliedSignal General Aviation Avionics, supra,* 74 F.3d at 887 ("When counsel has ample notice of a defect in service, does not attempt an obvious correction, and chooses to defend the validity of the service attempted, there is no good cause for the resulting delay if that method of service fails." [citation omitted]).

Petitioner should not be permitted to rely on his inexperience to establish good cause for his failure to properly and timely serve Minson because the district court told him exactly what he needed to do. Instead of mailing another copy

of the summons and complaint to Minson, Sanchez chose to stand his ground and insist that his earlier defective mailing was adequate. As the Eighth Circuit stated in *Adams*,

> At some point, a litigant must bear the consequences of conscious strategic or tactical decisions of this kind. Although this dismissal without prejudice may prove to have severe consequences, the district court correctly applied the applicable rules of civil procedure, carefully considered plaintiffs' arguments on the service issues, and gave plaintiffs repeated opportunities to correct their service insufficiencies.

Id. at 887-888.

IV. Petitioner was Afforded Due Process.

Petitioner asserts that the dismissal of his lawsuit violated his due process rights. Pet. at 2-4. His petition recites a litany of inapposite state court decisions to support the proposition that the Constitution guarantees every man his "day in court." What Petitioner fails to appreciate is that he *had* his day in court and that he was afforded due process. By failing to follow the rules of procedure and the clear and simple instructions of the district court, Sanchez forfeited his right to continue his legal action against Minson.

Sanchez attended the May 8, 2003 hearing on Minson's motion to dismiss pursuant to Rule 12(b)(5). In light of Sanchez's insistence that he had properly completed service of process, the district court clearly had the discretion to determine that any further extension of time would be futile. In any event, this hearing amply satisfied Sanchez's due

process rights. *Cf. Blaney v. West*, 209 F.3d 1027, 1030-1032 (7th Cir. 2000) (Due process is not offended by dismissal without advance notice or hearing when adequacy of service issue is presented on reconsideration).

Moreover, due process considerations dictated this outcome because the district court never gained jurisdiction over Minson as a defendant. It is a "bedrock principle" that "[i]n the absence of service of process . . . a court ordinarily may not exercise power over a party the complaint names as a defendant." *Murphy Brothers, Inc., supra*, 526 U.S. at 350, *quoting, Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("'Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.'"); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 (1946) ("Service of summons is the procedure by which a court . . . asserts jurisdiction over the person of the party served.'"). As this Court held in *Murphy Brothers*:

> one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.

Murphy Brothers, supra, 526 U.S. at 350.

Considerations of due process and fundamental fairness dictate that Sanchez's lawsuit could not proceed against Minson until he properly completed service of process. The only question which the district court had the authority to decide was whether or not it should exercise its discretion under Rule 4(m) to grant Sanchez yet *another* extension of

time to complete service. The scope of that discretion is "substantial" *Adams, supra,* at 888 and, as the Ninth Circuit Court of Appeals determined below, it was not abused.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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